

2015 WL 4039128 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

Margaret Ann HUNTER, Appellant,  
v.  
ANCHOR BANK, N.A., and Emigrant Mortgage Company, Inc., Respondents.

No. A14-1599.  
February 20, 2015.

**Brief and Addendum of Respondent Emigrant Mortgage Company, Inc.**

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**\*1 STATEMENT OF THE ISSUES**

## **I. WAS APPELLANT ENTITLED TO AMEND HER COMPLAINT EVEN THOUGH THE PROPOSED AMENDMENTS WERE FUTILE?**

The Court held in the negative finding that the proposed amendments were premature and would not survive summary judgment and, as such, amendment was not warranted.

### *Apposite Authority*

1. *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267 (Minn. 2008)
2. *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376 (Minn. Ct. App. 1996)
3. *Sterling State Bank v. Maas Commercial Properties, LLC*, No. A14-0190, 2014 WL 4289596 (Minn. Ct. App. Sept. 2, 2014)
4. *Hauschildt v. Beckingham*, 686 N.W.2d 829 (Minn. 2004)
5. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011)

## **II. DOES EMIGRANT'S SHOWING OF PREJUDICE PRECLUDE APPELLANT FROM AMENDING HER COMPLAINT?**

The Court did not address or issue a finding on Emigrant's argument of prejudice, but Emigrant successfully pled prejudice and the Court's decision can be upheld on any grounds.

### *Apposite Authority*

1. *McDonald v. Stonebraker*, 255 N.W.2d 827, 830 (Minn. 1977)

### **STATEMENT OF THE CASE**

Appellant, Margaret Ann Hunter (“Hunter” or “Appellant”), commenced an action on August 14, 2012 seeking to invalidate a mortgage foreclosure sale completed by Emigrant Mortgage Company, Inc. (“Emigrant”). (Complaint.) The Complaint included five causes of action: 1) Fraud and Misrepresentation; 2) Negligent \*2 Misrepresentation; 3) Promissory Estoppel; 4) Set Aside; and 5) **Financial Exploitation** of a Vulnerable Adult. (Id.) Counts one, two, three, and five related to the origination of a mortgage including challenges to the validity of that mortgage (Id.) Count four alleged the foreclosure of the mortgage was invalid and asserted damages based upon the defective foreclosure. (Id.) While one of the of the five causes of action related to the foreclosure of the mortgage, the vast majority of the Complaint alleged the mortgage was invalid and/or should be reformed to remove one of two properties encumbered by the mortgage. (Id.)

On November 28, 2012, Emigrant brought a Motion to Dismiss or for Summary Judgment in the alternative. (Order and Memorandum of Law, filed Jan. 24, 2013 (“DC Order 1.”) Hunter also brought a Motion to Amend the Complaint. (Id.; Plaintiff's Memorandum of Law in Support of its Motion to Amend its Complaint and Vacate the Bond, dated Nov. 14, 2012.) The proposed First Amended Complaint sought to add two counts to the lawsuit; a count to reform the mortgage to remove one of the two properties encumbered by the mortgage and a count alleging TILA violations related to the loan origination. (First Amended Complaint (draft), dated Nov. 14, 2102.) Neither of these proposed claims addressed the foreclosure of the relevant mortgage. (Id.) The district court granted Emigrant's Motion and denied Appellant's Motion on January 24, 2013. (DC Order 1.)

Hunter appealed DC Order 1 with respect to three issues. Two of those issues were unrelated to the validity of foreclosure sale, but were instead related to the origination of the mortgage and Hunter's Motion to Amend the Complaint. (Appellant's Brief,

\*3 Addendum and Appendix, Court File No. A13-0515, dated April 25, 2013.) On March 29, 2013, while the appeal was being briefed, Hunter brought a Motion for Stay of Execution of Judgment before the district court. (Order and Memorandum of Law, filed April 16, 2013 (“DC Order 2.”) On April 16, 2013, the court granted that motion, but required Hunter to post security in the amount of \$40,000.00 with the court. (Id.) On May 13, 2013, Hunter filed a Motion to Stay Execution of Judgment Pending Appeal with the Court of Appeals asking it to reconsider the district court’s imposition of the \$40,000.00 security. (Order, filed June 12, 2013 (“Appellate Order 1.”) The Court of Appeals affirmed the district court’s order. (Id.)

The Court of Appeals affirmed two of the three issues on appeal, which upheld dismissal of four of the five counts Hunter brought in her Complaint, all of which were unrelated to the foreclosure sale, as well as denial of Hunter’s Motion to Amend the Complaint, which sought to add claims unrelated to the foreclosure sale. (Opinion, filed Dec. 23, 2013 (“Appellate Order 2.”) The Court of Appeals reversed DC Order 1 with respect to the foreclosure sale and remanded the case back to the district court for further proceedings. (Id.)

Because Minnesota law requires that an order invalidating a foreclosure sale be recorded prior to commencement of any further foreclosure proceedings and that the order be in recordable form, Emigrant brought a Motion to Adopt the Court of Appeals’ Findings and dismiss the remaining claim with prejudice. (Order and Memorandum of Law, filed Jul 17, 2014 (“DC Order 3.”) Hunter simultaneously brought a second Motion to Amend the Complaint; this time seeking to “add” a Breach of Contract claim \*4 requesting alleged damages resulting from the February 9, 2012 foreclosure sale (despite the fact Hunter pled a cause of action for damages in her initial Complaint) and requesting an accounting of the debt she owed to Emigrant. (Appellant’s Addendum, pg. AA.34, “First Amended Complaint.”) The district court granted Emigrant’s Motion and denied Hunter’s Motion to Amend the Complaint. (DC Order 3.) Hunter now appeals the denial of her second Motion to Amend the Complaint.

### **STATEMENT OF THE FACTS**

On February 6, 2004, Hunter executed and delivered a promissory note to Anchor Bank, West St. Paul, NA (“Anchor Bank”) in the original principal amount of \$265,000.00 (“Note”). (Affidavit of Support Motion to Dismiss, dated October 4, 2012, ¶ 3.) In order to secure the indebtedness owed to Anchor Bank under the Note, Hunter executed and delivered a mortgage to Anchor Bank, dated February 6, 2004 (“Mortgage”), encumbering real property in Washington County legally described as Lot 37, Riverwood Acres No. 2 (commonly known as 1539 Cedar Lane, Newport, MN) (“Newport Property”) and encumbering real property in and Dakota County legally described as Lot 3, Block 1, Schindeldecker 2nd Addition (commonly known as 6020 Asher Court, Inver Grove Heights, MN) (“Inver Grove Property”). (Id. at Ex. 1.) The Mortgage was filed with the Washington County Recorder’s Office on February 12, 2004 as Document No. 3422717 and filed with the Dakota County Recorder’s Office on September 2, 2004 as Document No. 2244280. (Id.) Subsequent to the execution of the Note and Mortgage, Anchor Bank transferred its interest in the Note and Mortgage to \*5 Emigrant by means of an assignment of mortgage, dated February 6, 2004, (“Assignment”). (Id. at ¶ 4.)

Hunter defaulted under the terms of the Note and Mortgage for failure to make timely monthly payments beginning November 1, 2010. (Id. at ¶ 8.) As a result of Hunter’s default, Emigrant commenced non-judicial foreclosure proceedings of the Mortgage. (Id.) The foreclosure sale was held by the Washington County Sherriff on February 9, 2012. (Id. at Ex. 6.) Emigrant was the highest bidder at the Sale with a bid of \$287,431.26. (Id.) The foreclosure sale was voided by Court order and has since been rescinded. (Appellate Order 2, DC Order 3.) The Mortgage has since been assigned to Emigrant Mortgage Residential, LLC successor by merger to ESB - MH Holdings, LLC (“Emigrant Residential”). Emigrant Residential re-commenced foreclosure proceedings on January 1, 2015 and a foreclosure sale is currently scheduled for April 14, 2015. On February 9, 2015, Hunter commenced an additional lawsuit against Emigrant Residential in the State of Minnesota, County of Dakota alleging the same two causes of action that she attempted to add to her Complaint in the Washington County litigation and which are currently before this Court on appeal. That case has been removed to federal court (Court File No. 15-cv-00483) and Emigrant has scheduled a Motion to Dismiss for April 21, 2015.

### STANDARD OF REVIEW

In reviewing a district court's decision regarding amendment of a pleading, the Court of Appeals uses an abuse of discretion standard. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). The decision whether to allow an amendment is within \*6 the discretion of the district court and cannot be reversed unless there is a “clear abuse of discretion.” *Id.* A district court abuses its discretion when it bases its conclusions on an erroneous view of the law. *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011); see also *State v. Askland*, 784 N.W.2d 60, 62 (Minn.2010); *State v. Storkamp*, 656 N.W.2d 539, 541 (Minn.2003).

### ARGUMENT

Hunter appeals the district court's denial of her second Motion to Amend the Complaint; a motion she brought nearly two years after she filed the initial action, after the case was dismissed with prejudice, after this Court affirmed all but one aspect of the district court's order, and after the case was remanded to the district court to address the void foreclosure. Hunter sought to add two causes of action to her Complaint that are of relevance to this appeal; Count II - Breach of Contract and Count III -Declaration. (First Amended Complaint (draft), dated May 9, 2014.) Appellant asserts she is entitled to damages because Emigrant breached its mortgage contract by selling the two secured properties as one in violation of Minnesota law. (*Id.*) Appellant does so despite the fact she pled a cause of action for damages based upon the void foreclosure sale in her original Complaint; an issue that has already been fully and finally litigated and is not on appeal before this Court.

Hunter not only appeals her motion to amend to add claims that she has already had a chance to litigate, she does so after she first-breached the mortgage contract and set in motion the very events she relies on in support of her claims. Hunter's alleged \*7 damages, which she is unable to establish under Minnesota law, are damages she would have never incurred had she not first committed a material breach of the contract.

Lastly, Appellant argues she is entitled to a declaratory judgment establishing the amount Emigrant is owed pursuant to the terms of the Note and Mortgage. Appellant's claim was brought prior to any legal action being taken by Emigrant and without knowledge of the amount Emigrant intended to claim in a future legal proceeding. Because Hunter's claims are futile and because Emigrant would suffer prejudice if the Complaint was amended at this stage of the proceedings, the district court's order should be affirmed.

### I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO AMEND BECAUSE HER ADDITIONAL CLAIMS ARE FUTILE.

A court may deny an amendment to assert an additional claim where the amendment would serve no legal purpose. *Lumberman's Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580, 584 (Minn. Ct. App. 1991) (review denied (Minn. Apr. 1, 1991); *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. Ct. App. 1987). In deciding whether to allow an amendment to a pleading, the district court must consider whether the moving party has presented sufficient evidence to support its proposed amendment. *Matter of Condemnation of Certain Lands in City of White Bear Lake by City of White Bear Lake Housing and Redevelopment Authority*, 555 N.W.2d 541, 545 (Minn. Ct. App. 1996). A denial of a motion to amend is proper when the movant fails to demonstrate the existence of evidence to support the allegations the movant seeks to amend. \*8 *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 272 (Minn. 2008); *Stead-Bowers v. Langley*, 636 N.W.2d 334, 341 (Minn. Ct. App. 2001) (rev. denied (February 19, 2002)). Additional claims that cannot be maintained or that could not survive summary judgment are properly denied by the court. *Voicestream*, 743 N.W.2d at 272; *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 299 (Minn. Ct. App. 1986). The decision of a district court should be affirmed if sustainable on any grounds. See *Winkler v. Magnuson*, 539 N.W.2d 821, 825, 828 (Minn. Ct. App. 1995).

**A. Appellant has not submitted sufficient evidence of damages to support her claims for breach of contract.****1. Appellant has not asserted a claim for damages recognizable under contract or Minnesota law.**

Hunter asserts she is entitled to damages for the interest that accrued pursuant to the terms of the Note during the relevant litigation as well as her costs of litigation, including attorney's fees, costs, and disbursements. Interest is the payment of a reasonable sum for the loss of the use of money. *Potter v. Hartzell Propeller, Inc.*, 291 Minn. 513, 189 N.W.2d 499 (1971); *McCormack v. Hanksraft Co.*, 281 Minn. 571, 161 N.W.2d 523 (1968). In *General Mills, Inc. v. State*, 303 Minn. 66, 71, 226 N.W.2d 296, 299 (1975), the Minnesota Supreme Court stated: "Having decided that interest should be paid, we must also determine the period during which it will accrue. As between ordinary persons, interest on money runs from the time the money becomes due and payable until the payment is made." The Supreme Court later opined, "[i]t is rather obvious that interest expressly provided for in a promissory note is an enforceable property right of the creditor." \*9 *Thompson v. Gasparro*, 257 N.W.2d 355, 356 (Minn. 1977). It is a general rule that interest is an integral part of the debt and a claim for it must stand or fall with the principal debt. *Id.*

Appellant cannot sustain a cause of action for damages based upon the accrual of interest. The Note provides that interest shall accrue at the applicable variable rate unless a default in the terms of the Note occurs at which point a default rate of interest applies. This interest "will be charged on unpaid principal until the full amount of Principal has been paid." The terms of the Note, supported by Minnesota law, clearly establish Emigrant's right to the accrued interest. Appellant has not been damaged by the accrual of interest; it is a property right she conveyed to Emigrant upon execution of the contract and the impending litigation, litigation commenced by Hunter, does not stop the accrual of that interest..

Appellant also asserts she is entitled to her costs of litigation, namely her attorney's fees and costs. What Appellant failed to assert is a basis by which she could be allowed to recover attorney's fees as damages. An elementary principal of Minnesota law is that a person is not entitled to recover her costs of litigation, including attorney's fees, costs and disbursements, unless there is a statutory or contractual basis for such recovery. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). Appellant cannot cite to any authority, including the underlying loan documents that would support her theory for recovery. Furthermore, Appellant has not articulated what damages she thinks are attributable to the void foreclosure sale.

Appellant has litigated this case since 2010 and spent a majority of her time and expense attempting to prove she was defrauded by the bank and that the Mortgage is \*10 invalid as a result, arguments that she has lost and which have been fully and finally disposed of. Appellant lost five of the six causes of action initially pled in this case and has already once failed to obtain leave to amend her Complaint to add additional claims for reformation of the Mortgage. (DC Order 1, Appellate Order 2.) Over the course of this litigation, only a small portion of Appellant's efforts, and relatedly her attorney's fees and costs related to this litigation, are attributable to the validity of the February 9, 2012 foreclosure sale. The vast majority of the attorney's fees and costs she incurred in litigating HER lawsuit relate to her attempts to invalidate and/or reform the Mortgage and her attempts to obtain damages based upon fraud on the part of the relevant lenders, claims she lost in their entirety. Ms. Hunter cannot now claim she has been damaged because she incurred attorney's fees to prosecute a baseless lawsuit. Similarly, Ms. Hunter cannot claim she has been damaged because interest continued to accrue during the pendency of this lawsuit; a lawsuit that would have been very quickly and easily resolved had she not been trying to invalidate and/or reform a valid Mortgage and obtain unreasonable amounts of damages from Emigrant due to baseless allegations regarding origination.

**2. Appellant has failed to mitigate her alleged damages.**

Hunter's claim for damages fails because she did not mitigate her damages. Generally, a party alleging a breach of contract has a duty to mitigate any damages the party might sustain as a result of the breach. *Bass v. Equity Residential Holdings, LLC*, 849 N.W.2d 87, 92 (Minn. Ct. App. 2014). A borrower has the option, at any time, to pay the amount of the note in its entirety and thereby prevent the accrual of interest. \*11 *Thompson*, 257 N.W.2d at 356. A mortgagee maintains the statutory right to foreclose the mortgage up to fifteen (15) years after the stated maturity date in the mortgage. Minn. Stat. §541.03 (2014).



Appellant has had the opportunity to pay off the outstanding indebtedness at any time to prevent the accrual of interest. Appellant's claim that interest should not accrue during the pendency of a dispute over her loan is contrary to the terms of the contract and Minnesota law. There is no contractual provision that stops the accrual of interest during pending litigation or that removes accrued interest if a foreclosure sale is invalidated. Appellant, in seeking to amend her Complaint a second time, has asked this Court to rewrite the promissory note to alleviate her of obligations she herself negotiated. Granting Appellant's request would violate Emigrant's fundamental contract rights and set forth controversial precedent that would suspend the accrual of contractual interest during the pendency of litigation. Appellant cited no authority for her claim, and after a diligent search, Emigrant's counsel cannot find a single case on point.

### **3. Appellant improperly calculates her alleged damages from a “void” foreclosure sale.**

If the foreclosure sale is void, it is treated as if it never took place. See *Hayes-Broman v. J.P. Morgan Chase Bank, N.A.*, 724 F.Supp.2d 1003, 1018 (2010). Appellant's argument for breach is premised on the existence of an event from which damages could be measured. At the demand of Hunter, the February 9, 2012 foreclosure sale has been deemed void and thus treated as if it never took place. (Appellate Order 2.) Appellant received what she demanded and was restored ownership of the Inver Grove \*12 Property and Newport Property along with reinstatement of the Mortgage. By first requesting that the foreclosure sale be set aside and now claiming she is entitled to damages because of the invalid said, Appellant seeks to have her cake and eat it too. She simply cannot have it both ways. If the sale is void, it never happened and cannot be resurrected for use as a recognizable event in support of subsequent damage claims.

#### ***B. Appellant is precluded from asserting her breach of contract claim because she first committed a material breach of the contract that directly led to the foreclosure of the mortgage.***

In order to prevail on a claim for breach of contract, a complaining party must establish three elements: 1) a contract was formed; 2) the plaintiff has performed all conditions precedent; and 3) there was a breach by the defendant. *Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. Ct. App. 2008). A party must also establish that she has been damaged. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. Ct. App. 2004).

When analyzing a claim for breach, the Court must determine whether a party who first breaches the contract is precluded from complaining of a subsequent breach by the other party. *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 380 (Minn. App. 1996); 17A C.J.S. Contracts § 458 (1963). When conducting a first-breaching party analysis, two factors must be addressed; whether “1) the initial breach was continuing at the time the first breaching party brought the action against the subsequent breacher; and 2) the subsequent breach resulted directly from the initial breach.” *Carlson*, 549 N.W.2d at 380 (citing *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321, 327 (Minn.App.1985)).

\*13 The first-breach rule also requires that the initial breach be material. *TC/Am. Monorail, Inc. v. Custom Conveyor Corp.*, 822 N.W.2d 812, 817 (Minn. Ct. App. 2012) *rev'd on other grounds*, 840 N.W.2d 414 (Minn. 2013). A material breach is “[a] breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages.” *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728 (Minn. Ct. App. 2011) (citing *Black's Law Dictionary* 214 (9th ed.2009)). The first-breaching party analysis is applicable to the borrower-lender relationship where borrower is indebted to lender under the terms of a promissory note that is secured by a real estate mortgage. *Sterling State Bank v. Maas Commercial Properties, LLC*, No. A14-0190, 2014 WL 4289596, at \*3 (Minn. Ct. App. Sept. 2, 2014). To allow a first-breaching party to raise to its own advantage a breach of contract against another party would lead to an inequitable result. *MTS Co.*, 365 N.W.2d at 327.

Appellant has challenged the district court's order denying her Motion to Amend for breach of contract because she claims that Emigrant breached the contract under the criteria of *Thomas B. Olson & Associates, P.A.* and that the first-breaching party

rule is inapplicable to a mortgage contract. Appellant's analysis of the existence of a breach is incomplete and she provides no support for her opinion that there should be a new exception to an established legal doctrine.

Assuming Appellant was able to establish a claim for breach, her claim could not be sustained because her admission that she first-breached, and continues to breach, the contract precludes recovery. (Appellant's Brief, pg. 10, DC Order 3.) Appellant has \*14 admitted that she first breached the contract by failing to make her monthly payments, and that she continued to remain in default at the time of the void foreclosure. (Appellant's Brief, pg. 10, DC Order 3.) The fundamental, or material, purpose of a promissory note and real estate mortgage is that a borrower agrees to pay back money to a lender on a pre-determined schedule. When the debtor chooses to stop paying, the total contract is breached and the lender has the option to accelerate the debt, sue for damages, and/or foreclose the mortgage to recover its collateral. Lastly, and of great importance, is whether Appellant's failure to make monthly payments was directly linked to Emigrant's alleged breach of conducting a void foreclosure sale. In this case, the requirement that the conduct be directly related is undoubtedly met. Emigrant's alleged breach of conducting a foreclosure sale would have never even taken place but for Appellant's failure to make monthly payments.

Appellant spends a considerable amount of effort in her brief trying to manufacture an exception to the first-breaching party rule that would exclude contracts that contain default provisions. Specifically, Appellant argues that the only reason a mortgage contract exists is because parties contemplate a default at the time of origination. (Appellant's Brief, pg. 10.) Appellant goes further, to state that applying the first-breaching party rule to a contract that contains default provisions would be absurd and render the contract illusory. (*Id.*, at pgs. 10-11.) The key element that Appellant's argument overlooks is that the first-breaching party rule only applies when the alleged subsequent breach is directly related to the initial breach, not just "any breach."

\*15 In *Carlson* this Court conducted a thorough analysis of the first-breaching party rule and determined that the rule was not an available defense under the circumstances of that case. *Carlson*, 549 N.W.2d at 380. The commercial landlord in that case sought restitution of a leased premises following a tenant's breach of the lease contract by failing to meet established mandatory business hours and for harassment of third-parties. *Carlson*, 549 N.W.2d at 378. The tenant asserted the first-breaching party rule based on allegations that the landlord had previously failed to mitigate concerns over leaking fixtures and odors from a neighboring tenant. *Id.* The district court found that the first-breaching party rule was not available to tenant because tenant's harassment and profanity toward third-parties was not directly linked to the leakage and odor problems. *Id.* This Court affirmed the district court. *Id.* at 381. This Court also stated that the tenant may have remedies for the landlord's earlier unrelated breach, but that tenant's later conduct of harassment was not excused and the landlord could proceed to recover the property. *Id.* at 380. In her brief, Appellant seems to think the *Carlson* case disfavors application of the first-breaching party rule. Appellant's discussion is flawed and fails to recognize how the rule was applied in *Carlson* and the distinction between directly related conduct and unrelated conduct amongst the parties to the contract.

Appellant's opinion that the first-breaching party rule doesn't apply to mortgage contracts also fails to recognize its application under Minnesota law. The recent *Sterling State Bank* decision provides a strong rebuttal to Appellant's theory. In *Sterling*, a lender entered into a construction loan with borrower that was secured by one or more real estate mortgages. *Sterling*, WL 4289596 at \*1. After borrower defaulted under the terms \*16 of the loan documents, lender commenced a foreclosure of its mortgage. *Id.* Borrower responded and asserted the first-breaching rule defense by stating that an alleged earlier default by lender prevented lender from seeking recovery of the property. This Court again conducted an analysis of the first-breaching party rule, but determined that the rule's elements weren't met because the alleged initial breach by lender was in fact not a breach at all. *Id.* Without the existence of a first or initial breach, the first-breaching party rule was unavailable to the borrower as a defense to the claims. *Id.* at \* 5. It is clear from the facts of this case, however, and this Court's opinion in this case that the first-breaching party rule does apply to banking transactions. Here, there is no question as to whether Appellant committed and sustained a first or initial breach because she has admitted to first-breaching the contract by failing to make monthly mortgage payments. (Appellant's Brief, pg. 10, DC Order 3.) The *Sterling* case is also important to the analysis in this case in that it renders Appellant's opinion moot on the applicability of the rule to mortgage contracts.



***C. Appellant is barred from re-asserting her claim for breach of contract damages after she failed to appeal the district court's order for dismissal.***

Hunter seeks to add a count to her Complaint for damages based upon breach of contract despite the fact she already pled damages in her original Complaint. (Complaint, Count 4.) Res judicata applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt v. \*17 Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). Under Minnesota law, a party “should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation.” *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978)(citing *Shimp v. Sederstrom*, 305 Minn. 267, 270, 233 N.W.2d 292,294 (1975)). A plaintiff may not split a cause of action and bring successive suits involving the same set of factual circumstances. *Id.* An appellant waives an issue by failing to raise it in appellate briefing. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

In the present case Appellant has already litigated her breach of contract claim and has failed to appeal the district court's dismissal of that claim with prejudice. In her initial Complaint, Appellant alleged the claim of “Set Aside” as count four (4) to the Complaint and asserted damages accordingly. However, despite having already litigated her claim for damages as a result of the invalid foreclosure sale, Appellant again attempts to bring a second claim, albeit carrying a different title, for “Breach of Contract” based on her alleged damages resulting from the same void foreclosure sale. (Appellant's Addendum, pg. AA.34.) A common understanding of the application of Res Judicata would require that a second suit or action be brought following an earlier final judgment on the merits. Although this appeal does not involve commencement of a second lawsuit, Hunter's attempt to side-step the bar to duplicative litigation by bringing a motion to amend must be examined in the same manner.

In Appellant's Notice of Appeal, she listed the following specific issues to be raised on appeal: 1) Did the Trial Court err by denying Ms. Hunter's Motion to Amend the Complaint?; 2) Did the District Court erroneously find that Ms. Hunter is barred from *\*18* pursuing Emigrant Mortgage Company, Inc. for breach of contract because she is the “first breaching party”?; and 3) Did the District Court erroneously rule that Ms. Hunter's declaratory claims are “premature”? More importantly, Appellant's Brief lists just two legal issues to be presented to this Court: 1) Does the “First Breaching Party” Defense Release a Lender from Complying With terms of a Mortgage if a Borrower has a Payment Default?; and 2) Is a Borrower's Declaratory Action to Determine the Balance of a Loan “Premature” When a Foreclosure Bank Sends Balance Statements that Arbitrarily Rise and Fall with no Explanation or Itemization and the Borrower disputes the amount claimed to be due? In summary of each of the two issues raised in Appellant's brief, she makes it clear that both issues were raised with regard to the district court's denial of her latest motion to amend. Appellant's Brief, pgs. 4-5.

Appellant did not appeal the district court's grant of dismissal with prejudice of Appellant's foreclosure-related claim, which included a request for damages, and makes absolutely no reference or legal argument in her brief to dispute the district court's Order on those grounds. (DC Order 3.) Thus, the district court's order in regard to dismissal of this claim, including any request for damages, is a final judgment on the merits.

When applying the four *Hauschildt* factors, Appellant's attempt to re-litigate her earlier claim under the guise of a Motion to Amend must fail. The first factor requires that the claims be premised on the same set of factual circumstances and here both the earlier claim to set aside the foreclosure sale and the proposed claim for breach of contract seek damages as a direct result of the same February 9, 2012 foreclosure sale. The second factor requires that the same parties be involved and here the prior claims *\*19* involved Appellant and Emigrant and the proposed new claims do as well. The third factor requires a final judgment on the merits and in this case an order for judgment dismissing the foreclosure claim with prejudice was entered on July 18, 2014. (DC Order 3.) Lastly, the fourth factor requires a full and fair ability to litigate. Appellant asserted her claim to set aside the foreclosure sale and for damages nearly two years before bringing the relevant motion to amend. Not only did Appellant have an opportunity to litigate her claim prior to the first dismissal by the district court, she had an additional opportunity to litigate her claim on remand from her previous appeal, Case No. A13-0515. (Appellate Order 2.) Because the four *Hauschildt* factors

are met, Appellant is barred from having a second (third when considering the earlier remand of her “Set Aside” claim) chance to seek damages resulting from the void foreclosure sale.

***D. Appellant's request for leave to amend to seek a determination of the outstanding indebtedness was premature.***

Under the Declaratory Judgments Act, courts have the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011); Minn. Stat. § 555.01 (2014). If the parties to a declaratory action present no justiciable controversy, the court is without jurisdiction to declare rights. *S. Minnesota Const. Co. v. Minnesota Dep't of Transp.*, 637 N.W.2d 339, 344 (Minn. Ct. App. 2002). A justiciable controversy exists if the claim “(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than \*20 presenting hypothetical facts that would form an advisory opinion.” *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336 (Minn. 2011). A court cannot review what does not exist. *Minnesota Educ. Ass'n v. Minnesota State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993). An injury that is merely possible or hypothetical is not enough to establish justiciability. *McCaughtry*, 808 N.W.2d at 338. An issue is not fit for review when further factual development would significantly advance the court's ability to deal with the legal issues presented. *Id.*

Appellant moved the district court for leave to seek declaratory relief determining the outstanding indebtedness currently owed to Emigrant under the terms of the Note and Mortgage. At the time of Appellant's Motion, and at the time the district court issued its order denying the motion to amend, Emigrant had not re-commenced foreclosure proceedings or initiated a judicial action seeking judgment on the debt. (Emigrant's Memo In Opposition to Motion to Amend, dated May 16, 2014.) At all times relevant to the district court's order on appeal before this Court, Emigrant had not initiated a legal proceeding for enforcement of the debt.

In support of her request for declaratory relief, Appellant focuses on her receipt of monthly mortgage statements summarizing the outstanding debt that she alleges “... vary from month to month and rise and fall for no apparent reason.” (Appellant's Brief, pg. 14.) Appellant's concerns regarding the monthly statements were addressed before the district court. (DC Order 3.) Appellant's confusion seems to result because she has not reviewed the monthly statement closely enough. The monthly statements contained the following information in bold-type print:

**\*21** “\*These amounts may have changed due to payments and/or additional expenses such as attorney's fees and costs. If your loan is in foreclosure or other litigation, you may be responsible for these expenses under the terms of your loan and applicable law. You may also have the legal right to reinstate your loan after acceleration. For the current total amount due or the reinstatement amount, please contact us or the attorney representing us in your litigation.”

(Appellant's Addendum, pg. AA 12 - AA.16.) The monthly amount owed to Emigrant naturally increased over the passage of time due to the per diem accrual of interest, necessary advances, and the ongoing litigation costs Emigrant incurred defending Appellant's unsuccessful attack on the validity of the Mortgage. Appellant never once attempted to call for an up-to-date amount due and thus cannot reasonably claim that she was unaware of why the monthly statements varied from month-to-month.

Appellant's attempt to base her declaratory claim for relief on monthly mortgage statements was premature because Emigrant maintained the right to determine the amount of outstanding debt at the time of enforcement. Emigrant maintained the right to foreclose, either judicially or non-judicially, with or without asserting a claim that included the amounts disputed by Appellant. The district court was not in a position to determine the rights of the parties without knowing how Emigrant was going to proceed in a future enforcement action. The district court would have simply been hypothesizing as to what amount Emigrant could later choose to enforce and, had the district court chosen to go down that path, Emigrant would have been subjected to the exact same claims for all sums added to the outstanding debt following the district court's determination. Under Appellant's theory,

a justiciable controversy would be presented \*22 every single day interest accrues or each time a lender applies advances to a loan balance prior to commencing enforcement proceedings.<sup>1</sup>

Appellant also alleges that the district court erred in denying her motion to amend to determine the reasonableness of Emigrant's attorney's fees under the holding in *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49 (Minn. 2012). The *United Prairie Bank* court concluded that a claim for a monetary payment under a contractual indemnity provision is a legal claim with an attendant right to a jury trial. *Id.* at pg. 57. The current status of Minnesota law may grant an indemnifying party the right to a jury trial, but that right does not become ripe until that party faces such a claim. Here, Emigrant had not commenced an action to enforce the debt at the time of Appellant's motion. A monthly mortgage statement is merely a statement of the amount owed and is not an acceptable means to commence a legal claim under Minnesota law. In the absence of a legal claim against Appellant for the recovery of attorney's fees, the district court properly denied her motion for leave to amend her Complaint on those grounds as premature.

## **\*23 II. EMIGRANT WOULD BE SEVERELY PREJUDICED IF APPELLANT WAS GRANTED LEAVE TO AMEND HER COMPLAINT.**

When evaluating whether a motion for amendment of the pleadings should be granted, a trial court must consider “the prejudice which may result to the opposing party.” *McDonald v. Stonebraker*, 255 N.W.2d 827, 830 (Minn. 1977). Leave to amend is properly denied when the amendment would result in delay, prejudicing the non-moving party. *Bastianson v. Forscher*, 196 N.W.2d 451, 455 (Minn. 1972).

### ***A. Emigrant would be prejudiced if it was required to defend Appellant's breach of contract claim a second time following final dismissal by the district court.***

The only issues on appeal are those which were raised by Appellant in her initial brief. *Jensen*, 688 N.W.2d at 578-79. Appellant did not appeal the district court's dismissal with prejudice of the claim to set aside the February, 2012 foreclosure sale, which included a request for damages, she asserted against Emigrant in 2012. Thus, the district court's order for dismissal with prejudice on those grounds is a final judgment on the merits.

Emigrant has already been forced to defend Appellant's damages claim twice, once following commencement of the Appellant's case in 2012 and again following remand to the district court in 2014. Emigrant would suffer great prejudice if forced to re-litigate Appellant's “new” claims, which involve the same exact parties and same exact set of factual circumstances, a third time.

### ***\*24 B. Appellant was not entitled to amend her complaint nearly two years after commencement of the case and at the expense of Emigrant.***

Appellant commenced this action in 2012, unsuccessfully sought leave to amend in 2013, and then nearly two years later again sought leave to amend her Complaint to include claims with facts and circumstances known to Appellant at the time she originally filed her Complaint in 2012.

Since 2010, Appellant has enjoyed exclusive use and occupancy of both the Inver Grove Property and the Newport Property. Moreover, while Appellant retains possession of the properties and refuses to make monthly mortgage payments, she has still taken the opportunity to collect, and withhold, rents from the properties. Emigrant is further prejudiced every day Appellant successfully drags out this litigation by incurring defense costs and being deprived of its collateral. For these reasons, the district court was within its discretion to deny Appellant's Motion to Amend.

Following issuance of the district court's order voiding the February 9, 2012 foreclosure sale and reinstating the mortgage, Emigrant attempted to re-commence foreclosure proceedings against the two subject properties. In response to the new

foreclosure proceedings, Appellant commenced another lawsuit in Dakota County District Court<sup>2</sup> asserting the same claims presently before this Court and requesting injunctive relief to prevent Emigrant from proceeding with a foreclosure. Appellant's actions are calculated and only intended to prolong her exclusive use of the properties and collection of rents. Appellant cannot be allowed to continue down this path of never-ending litigation while Emigrant is forced to sit on the sidelines and endure further prejudice.

### ***CONCLUSION***

Based on the foregoing, Emigrant respectfully requests that the Court affirm the district court's order denying Appellant's motion to amend her Complaint. Appellant had ample opportunity to litigate her claims relating to the February 9, 2012 foreclosure sale in earlier proceedings and failed to appeal dismissal of those claims. Moreover, Appellant cannot be allowed to sustain damage claims that directly result from her initial, material breach of the mortgage contract. Hunter has exhausted her opportunities to assert damages allegedly resulting from the void foreclosure sale and thus the district court's order should be upheld.

Respectfully Submitted,

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Dated: February 19, 2015

#### Footnotes

- <sup>1</sup> Interestingly, on February 9, 2015, Appellant commenced a second action against Emigrant's successor by which Appellant again asserts a count for declaratory relief to determine the outstanding amount of debt and for a jury trial on the reasonableness of Emigrant's attorney's fees. Dakota County District Court file no. 19HA-CV-15-470, U.S. District Court file no. 15-cv-00483. Although Appellant's actions are procedurally improper and a waste of resources considering the status of this appeal, it is possible that the timing of the newly commenced litigation may be more appropriate given it was filed after Emigrant re-commenced foreclosure proceedings on January 1, 2015.
- <sup>2</sup> The case has since been removed to U.S. District Court for the District of Minnesota, case no. 15-cv-00483.